Supreme Court, U.S.
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No. ____

IN THE SUPREME COURT OF THE UNITED STATES

WASHINGTON STATE DEPARTMENT OF SOCIAL AND HEALTH SERVICES, ET AL.,

PETITIONERS,

v.

GUARDIANSHIP ESTATE OF DANNY KEFFELER, BY WANDA PIERCE, GUARDIAN, AND OTHER PERSONS SIMILARLY SITUATED,

RESPONDENTS.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF WASHINGTON

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

42 U.S.C. §§ 405(j) and 1383(a) authorize the Commissioner of Social Security to appoint a representative payee to receive benefits on behalf of a beneficiary, and social security regulations provide that the payee may use the benefits to pay for the beneficiary's current care. 42 U.S.C. § 407(a) provides that these benefits are not subject to "execution, levy, attachment, garnishment, or other legal process". This case presents the following question:

Does a representative payee violate 42 U.S.C. § 407(a) when the payee uses the benefits to pay for the beneficiary's current care?

LIST OF PARTIES

Petitioners:

The Washington State Department of Social and Health Services;

Lyle Quasim was the Secretary of the Department of Social and Health Services when this matter was originally filed. Dennis Braddock is Mr. Quasim's successor and the current Secretary of the Department of Social and Health Services;

Michael R. Hobbs, Program Manager for the Department of Social and Health Services.

Respondents:

Guardianship Estate of Danny Keffeler, by Wanda Pierce, Guardian, and other persons similarly situated.

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PETITION FOR A WRIT OF CERTIORARI

The Attorney General of Washington, on behalf of the Washington State Department of Social and Health Services and the other petitioners, respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Washington in this case.

OPINIONS BELOW

The opinion of the Washington Supreme Court is reported at 145 Wash. 2d 1, 32 P.3d 267. App. at 1.[1] The Okanogan County Superior Court's Memorandum Opinion, App. at 22, Plaintiff's Order Granting Plaintiff's Motion For Summary Judgment, App. at 112, and Court's Findings Of Fact On Order Of Remand From The Supreme Court, App. at 46, are unpublished.

JURISDICTION

The judgment of the Washington Supreme Court was entered October 11, 2001. App. at 1. A timely motion for reconsideration was denied December 14, 2001. App. at 40. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

STATUTORY PROVISIONS INVOLVED

42 U.S.C. § 407(a), provides: "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." App. at 170.

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[1] "App." refers to the separately bound Appendix To The Petition For A Writ Of Certiorari.

The other relevant provisions of Title II of the Social Security Act, 42 U.S.C. §§ 401 *et seq.*, App. at 145; Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.*, App. at 177; social security regulations, App. at 205; and Washington state statutes, App. at 245, and regulations, App. at 256, are set forth in the appendix.

STATEMENT

Under Washington law, children who have been abandoned, neglected, or abused are placed in the care and custody of the Washington Department of Social and Health Services (the Department). A number of those children are or become eligible for payments from the Social Security Administration (SSA), either because they are dependents of a deceased or disabled parent or because they, themselves, are indigent and disabled. Unless there is a relative or guardian qualified to act on behalf of the child, the Commissioner of Social Security (the Commissioner) appoints the Department representative payee to receive benefits on behalf of eligible foster children in the Department's care. Complying with social security regulations, the Department uses the benefits to pay for the beneficiary's current care and special needs.

This case raises the question whether another provision of the Social Security Act, 42 U.S.C. § 407(a), prohibits representative payees from using benefits to pay for a beneficiary's current care. This is a very important question. It involves every public agency serving as representative payee. Moreover, the principles upon which it will be decided apply equally when a parent or other person with custody of a child is appointed payee.

A. Statutory And Regulatory Background

1. This case involves two different categories of benefits under the Social Security Act. The first is authorized by Title II of the Act. 42 U.S.C. §§ 401

et seq. As originally enacted in 1935, Title II provided a monthly retirement benefit for wage earners reaching the age of 65. August 14, 1935, ch. 531, Title II, § 201, 49 Stat. 622. In 1939, the law was expanded to provide secondary benefits for wives, children, widows, and parents of wage earners. Aug. 10, 1939, ch. 666, Title II, § 201, 53 Stat. 1362.

The purpose of the added benefit was "to provide persons dependent on the wage earner with protection against the economic hardship occasioned by loss of the wage earner's support". *Califano v. Jobst*, 434 U.S. 47, 50 (1977). In other words, the benefit was designed to replace the support provided by the wage earner. Under Title II, a child is eligible for social security benefits if the child is under the age of 18, unmarried, and was dependent on a wage earner entitled to Title II benefits. 42 U.S.C. § 402(d), App. at 145.

The second type of benefit is Supplemental Security Income (SSI) authorized by Title XVI of the Social Security Act, 42 U.S.C. §§ 1381 *et seq.* SSI benefits are available to aged, blind, or disabled individuals who meet certain income and resource requirements. 42 U.S.C. § 1381a, App. at 177.

The SSI program was created in 1972. Oct. 30, 1972, Pub. L. No. 92-603, Title I, §§ 132(a) to (c), 136, Title III, § 305(a), 86 Stat. 1360, 1364, 1484. It replaced "the financial assistance programs for the aged, blind, and disabled in the 50 States and the District of Columbia for which grants were made under the Social Security Act". 20 C.F.R. § 416.110, App. at 228. The purpose was "to assure a minimum level of income for people who are age 65 or over, or who are blind or disabled and who do not have sufficient income and resources to maintain a standard of living at the established Federal minimum income level". 20 C.F.R. § 416.110, App. at 228. Thus, SSI is a type of public assistance program.

To qualify for SSI benefits a child must establish a disability and meet income and resource limits. 42 U.S.C. § 1382-1382d; 20 C.F.R. § 416.202, App. at 231. So,

unlike social security benefits under Title II, there is a limit on the resources an SSI beneficiary may accrue and still maintain eligibility. Since 1989, this amount has been $2,000. 20 C.F.R. § 416.1205(c), App. at 244.

2. The Social Security Act authorizes the Commissioner to appoint a representative payee to receive social security and SSI benefits where it would serve the interest of the beneficiary. 42 U.S.C. §§ 405(j)(1)(A), App. at 157; 1383(a)(2)(A)(ii)(I), App. at 178. In general, if a beneficiary is under the age of 18, the Commissioner will appoint a representative payee. 20 C.F.R. §§ 404.2010(b), App. at 207; 416.610(b), App. at 233. For such underage beneficiaries, the Commissioner prefers to appoint a parent, stepparent, relative, or close friend. If none of those is suitable under the circumstances, the last preference is an authorized social service agency, such as the Department. 20 C.F.R. §§ 404.2021(b), App. at 209; 416.621(b), App. at 234.

Before a representative payee is appointed, the Commissioner is required to conduct an investigation of the payee. 42 U.S.C. §§ 405(j)(2)(A), App. at 158; 1383(a)(2)(B)(i), App. at 179. The Commissioner must also notify the beneficiary's legal guardian or legal representative of the payee's appointment, and the appointment may be appealed. 42 U.S.C. §§ 405(j)(2)(E)(ii), App. at 164; 1383(a)(2)(B)(xi)-(xiii), App. at 182-85.

The Commissioner is also required to establish a system of accountability to make sure that the benefits are properly used, and if the payee is a state institution, the Commissioner "shall establish a system of accountability monitoring for institutions in each State". 42 U.S.C. §§ 405(j)(3)(B), App. at 165; 1383(a)(2)(C)(ii), App. at 185. In addition to this monitoring, the Commissioner can require a report from a payee at any time if the Commissioner believes that benefits are being misused. 42 U.S.C. §§ 405(j)(3)(D), App. at 165; 1383(a)(2)(C)(iv), App. at 186. If the Commissioner finds that a representative payee has

misused benefits, the law requires the Commissioner to "promptly revoke certification for payment of benefits to such representative payee . . . and certify payment to an alternative representative payee". 42 U.S.C. §§ 405(j)(1)(A), App. at 159; 1383(a)(2)(A)(iii), App. at 179. Knowingly misusing benefits is also a felony. 42 U.S.C. § 408(a)(5), App. at 172.

3. Once appointed, the representative payee is responsible for using the benefits "only for the use and benefit of the beneficiary in a manner and for the purposes he or she determines, under the guidelines in this subpart, to be in the best interests of the beneficiary". 20 C.F.R. §§ 404.2035, App. at 213; 416.635(a), App. at 236. Under the Commissioner's regulations, the benefits are deemed to have been used "for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance". 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 234. The regulations provide that current maintenance includes "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items". 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 234. Benefits may also be used for institutional care. 20 C.F.R. §§ 404.2040(b), App. at 214; 416.640(b), App. at 237.

After a payee has used the benefits for current maintenance and the other purposes authorized under the regulations, any remaining amount must be conserved or invested, preferably in interest-bearing accounts. 20 C.F.R. §§ 404.2045, App. at 223; 416.645, App. at 242.

4. The Social Security Act also contains an anti-attachment provision that limits the ability of creditors and other third-parties to attach or encumber social security and SSI benefits. According to that provision:

> "The right of any person to any future payment under this subchapter shall not be transferable or assignable, at law or in equity, and

> none of the moneys paid or payable or rights existing under this subchapter shall be subject to execution, levy, attachment, garnishment, or other legal process, or to the operation of any bankruptcy or insolvency law." 42 U.S.C. § 407(a), App. at 170.

See also 42 U.S.C. § 1383(d)(1), App. at 200 (applying § 407(a) to SSI benefits).

Section 407(a) is primarily aimed at ensuring that the benefits are used for the beneficiary's current care and are not diverted by creditors, through compulsory process, to pay past debts. Social Security regulations provide that a "payee may not be *required* to use benefit payments to satisfy a debt of the beneficiary, if the debt arose prior to the first month for which payments are certified to a payee". 20 C.F.R. §§ 404.2040(d), App. at 216; 416.640(d), App. at 239 (emphasis added). However, it is *permissible* for the payee to satisfy such a debt "if the current and reasonably foreseeable needs of the beneficiary are met". 20 C.F.R. §§ 404.2040(d), App. at 216; 416.640(d), App. at 239.

B. The Department's Responsibilities As Representative Payee For Foster Children

1. The Department is responsible for protecting children. Washington has a carefully crafted system—including judicial oversight—for removing a dependent child from his or her home and placing the child in foster care. Wash. Rev. Code 13.34. A "dependent child" is one who has been abandoned, is abused or neglected, or has no parent, guardian, or other custodian capable of adequately caring for the child. Wash. Rev. Code § 13.34.030(5), App. at 246.

Once a court finds that a child is dependent it may order "the child to be removed from his or her home and into the *custody, control, and care of a relative or the department* or a licensed child placing agency for placement in a foster family home or group care facility". Wash. Rev. Code § 13.34.130(1)(b), App. at 250 (emphasis added). When a

child is removed from the home, "[p]lacement of the child with a relative . . . shall be given preference by the court." Wash. Rev. Code § 13.34.130(2), App. at 251. Thus, children in the Department's custody are placed in foster care when there is no other suitable relative willing to care for them. In September 1999, there were 10,578 foster children in the Department's care. App. at 49, ¶ 3.

2. Although the Department pays the cost of foster care, it is not primarily an obligation of the state. Foster care is a form of public assistance, and the Washington Legislature has declared that it is the "public policy [of Washington] that children shall be maintained from the resources of responsible parents, thereby relieving, at least in part, the burden presently borne by the general citizenry through welfare programs". Wash. Rev. Code § 74.20A.010, App. at 255.

In addition to requiring parents to pay for the care of their children, the Department is authorized to use social security and SSI benefits to pay for a child's current care. If no guardian for a child's estate has been appointed, the Secretary of the Department (the Secretary) is authorized to act as representative payee for children in foster care, and he "may apply such funds against the amount of public assistance otherwise payable to such [foster child]". Wash. Rev. Code § 74.13.060(2), (5), App. at 253, 254. Under a regulation adopted by the Secretary, if "a child in foster care is entitled to financial benefits the income received shall be used on behalf of the child to help pay for the cost of foster care received". Wash. Admin. Code § 388-70-069(1) (2001), App. at 257.[2] Income includes "SSI, [Retirement Survivors and Disability Insurance], veteran's benefits, railroad retirement benefits, inheritances, or any other payments for

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[2] Wash. Admin. Code § 388-70-069 was repealed in April 2001, but was replaced with a functionally similar provision, Wash. Admin. Code § 388-25-0210. App. at 257, 256, respectively.

which the child is eligible, unless specifically exempted by the terms and conditions of the receipt of the income". Former Wash. Admin. Code § 388-70-069(2), App. at 256.

Of the 10,578 children in foster care in September 1999, approximately 1,480 children were receiving benefits—469 received social security benefits under Title II and 923 received SSI benefits under Title XVI. About 88 children received both. App. at 49, ¶¶ 6-7.

3. When a child in foster care becomes eligible for social security or SSI benefits, and the Department is appointed representative payee, the payee functions are performed by two different units within the Department—the Children's Administration and the Trust Fund Unit. Children's Administration social workers are responsible for providing foster care services to all foster children regardless of whether they receive social security or SSI benefits. This includes preparing an Individual Service and Safety Plan, which addresses the child's needs and where the child should live. App. at 51, ¶ 15; 63-64, ¶ 60.

When a child is in foster care, the foster parent pays for the child's food, clothing, shelter, and other needs. The Department then pays the foster parent based on a rate schedule. App. at 55, ¶ 25. In addition to basic foster care, the schedule includes 25 other categories that cover a wide variety of special foster care services, including transportation costs for the child; care for children with behavioral or emotional problems or who are disabled; medical care; funding for activities related to skill building or the development of an enhanced self-image such as music lessons or participation in recreational activities; and additional clothing.[3] All of these payments are for direct

[3] State's Ex. No. 1, Supplemental, Defendant's Response To Plaintiff's Order To Produce 9, Social Service Payment System Manual, App. C, Service Codes 3201, 3206, 3210, 3212, 3213, 3217, 3225.

services to the child and do not include the Department's administrative expenses.

Children's Administration staff apply to SSA for social security and SSI benefits on behalf of foster children. The reason the Department applies for benefits and serves as representative payee is that there is rarely anyone else to do it. If the staff believes that a denial of benefits is erroneous, they will appeal on behalf of the child. App. at 63, ¶ 59. The staff also does the work required to maintain eligibility for social security and SSI benefits. The process to maintain SSI benefits is complex and involves redetermination of a child's disability and financial status. App. 64-66, ¶ 63-67. The Children's Administration maintains a staff of 27 just for the purpose of applying for and maintaining SSI eligibility.

4. The Trust Fund Unit is responsible for accounting for benefits received by the foster children in the Department's care. App. at 51, ¶ 14. When benefits are received they are deposited in a special Foster Care Trust Fund Account in the State Treasurer's Office.[4] The Unit maintains an individual subsidiary account for each child. App. at 51-52, ¶¶ 16-17. The Trust Fund Unit is responsible for ensuring that each child receives the correct benefits and works with SSA to resolve discrepancies regarding benefits due or over-payments. The Unit is also responsible for

[4] The only exception occurs when the Department receives a retroactive lump sum payment of SSI benefits that exceeds six times the monthly benefit amount. In this case, SSA deposits the lump sum payment directly into a dedicated interest-bearing account in a local bank. These funds cannot be used to pay for basic foster care services and can only be expended for special needs, primarily related to the impairment that gave rise to SSI eligibility. App. at 52, ¶ 18. If the retroactive payment involves a social security payment or an SSI payment of less then six times the monthly SSI benefit, it may be used to pay for the cost of care for the months for which the benefit was granted. For example, a retroactive payment in May for the months of February, March, and April, may be used to pay for care for the months of February, March, and April.

complying with SSA's strict reporting and accounting requirements. App. at 67, ¶¶ 71-73.

5. The Trust Fund Unit uses the child's benefits to pay for the child's foster care. For example, during the month of February, the Department pays foster parents and other providers for the child's January foster care expenses. App. at 56, ¶ 27. In the next month, March, the Trust Fund Unit reviews the Department's foster care payment records for each of the beneficiaries to determine the amount of benefits to be used for the child's foster care. If the January benefit is less than or equal to the cost of care for January, it is used for this purpose, and the Trust Fund Unit transfers the funds to the Department. App. at 56, ¶¶ 28-29. If the January benefit is greater than the cost of care in January, the excess amount is deposited in a local bank for the benefit of the child. Funds in the account are available for special needs, and the interest earned on the account is credited to the child's trust fund account. App. at 62, ¶ 55.

Social workers can request that a child's benefits be used to pay for special items beyond the basic foster care and special needs categories paid for by the Department. These items include computers, educational expenses, toys, clothing, athletic equipment, and orthodontics. Social workers can also request that a child's benefits be conserved for a period prior to emancipation. App. at 57, ¶ 34; 58, ¶ 34; 64, ¶ 62. The Trust Fund Unit can grant these requests instead of paying for foster care, if the item is of direct benefit to the child. App. at 56-57, ¶¶ 30-33.

6. A child's social security and SSI benefits seldom pay for the entire amount of a child's foster care. For example, in this case, Nacole Blimka received $7,912 in benefits and the Department paid $28,769 for her foster care.[5] Sara Nelson received $751 in benefits and the

[5] State's Ex. No. 1 Supplemental, Defendant's Response To Plaintiff's Order To Produce 1, Blimka, Nacole, at 1, 3.

Department paid $25,445 for her foster care.[6] Denita Smith received $3,529 and the Department paid $14,933.[7]

C. Procedural History

1. In 1989, Danny Keffeler was voluntarily placed in foster care with the Department by his mother, who soon thereafter died in an automobile crash. The Okanogan County Superior Court appointed Danny's Grandmother, respondent Wanda Pierce, guardian of his estate. Although Mrs. Pierce was appointed his guardian, the court found that Danny was dependent and left him in foster care in the custody of the Department.

Mrs. Pierce was appointed representative payee to receive Danny's social security benefits. Subsequently, the Commissioner removed Mrs. Pierce and appointed the Department payee. The Department served in this capacity for about two years. During this time, the Department applied the benefits to Danny's cost of care. Mrs. Pierce objected to her removal as Danny's payee, and she was ultimately reinstated.

2. In 1996, Mrs. Pierce brought an action against the Department on behalf of the Estate of Danny Keffeler to recover the social security benefits the Department used to pay for Danny's care during the time when the Department was his representative payee. The action was also brought on behalf of a class of foster children in the Department's care who receive social security benefits. The complaint alleged that the Department's use of social security benefits to pay for the cost of care violated the Social Security Act's anti-attachment provision, 42 U.S.C. § 407(a).

[6] State's Ex. No. 1 Supplemental, Defendant's Response To Plaintiff's Order To Produce 1, Nelson, Sarah, at 1, 5.

[7] State's Ex. No. 1 Supplemental, Defendant's Response To Plaintiff's Order To Produce 1, Smith, Denita. at 1, 4.

In 1997, the Okanogan County Superior Court certified the class to include all past, present, and future foster children in Washington who receive Title II social security payments for whom the Department acts or has sought to act as representative payee. App. at 138. The court also denied the Department's motion to dismiss the complaint for failure to join the SSA as an indispensable party. App. at 139. Subsequently, the trial court also entered an order amending the class definition to include foster children receiving SSI benefits under Title XVI. App. at 134.

The parties moved for summary judgment, and in 1998, the trial court issued a Memorandum Opinion ruling in favor of the plaintiffs. App. at 122. The trial court concluded that the Department's use of social security or SSI benefits to pay for current care violated 42 U.S.C. § 407(a). The court enjoined the Department from using social security and SSI benefits to pay for the cost of a foster child's care and "from in any way administering the funds to offset the State's cost of maintaining a child in foster care". App. at 117, ¶ 2.3. The order required the Department to provide an accounting of social security and SSI benefits received and spent on class members since April 18, 1975. App. at 117, ¶ 3.1. Based on this accounting, plaintiffs were authorized to file a claim to be paid into a common fund to be administered by a guardian approved by the court. App. at 118, ¶¶ 4.1-4.2.[8]

3. The Department appealed the trial court's judgment to the Washington Court of Appeals, which certified the case to the Washington Supreme Court.[9] Subsequently, the United States Department of Justice filed an amicus curiae brief in support of the Department on behalf of the Commissioner and participated in oral argument before the Washington Supreme Court. After argument, the court issued an Order remanding the case to the trial court for additional fact finding. App. at 43. At the conclusion of the fact finding, the trial court entered the Court's Findings Of Fact On Order Of Remand From Supreme Court. App. at 46. The parties and the Department of Justice filed supplemental briefs. The Washington Supreme Court held a second oral argument. The Department of Justice also participated in this argument in support of the Department. On October 11, 2001, the Washington Supreme Court entered its judgment in *Guardianship Estate of Keffeler v. Department of Social & Health Services*, 145 Wash. 2d 1, 32 P.3d 267 (2001). App. at 1.

a. The five-justice majority opinion affirmed the trial court. The majority began its analysis by asserting its belief that a foster child is better off with a private representative payee than with the Department. According to the court, if the Department is appointed payee, it will use the benefits to pay for current care, but if there is a private payee, 42 U.S.C. § 407(a) prohibits the Department from requiring that the benefits be used to pay for current care.

According to the majority opinion, the "critical question" in the case was whether the Department "acts as a *creditor*" within the meaning of the anti-attachment provision "when it reimburses itself for foster care costs out of the foster childrens benefits". App. at 19. The majority next

[8] The trial court also awarded the Estate of Danny Keffeler $4,998, which was the amount of the benefits the Department used to pay for Danny's care while the Department was his payee. App. at 120, ¶ 6.1.

[9] The Department did not appeal the judgment in favor of the Estate of Danny Keffeler. This judgment required the Department to repay benefits it received as Danny's representative payee, which were used to pay for the cost of his care. App. at 120, ¶¶ 6.1-6.3. As a matter of state law the Department was not authorized to be Danny's payee because his grandmother, Wanda Pierce, had been appointed guardian of his estate. Wash. Rev. Code § 74.13.060(5), App. at 254, provides that the "appointment of a guardian for the estate of such person shall terminate the secretary's authority as custodian of said funds".

discussed *Philpott v. Essex County Welfare Board*, 409 U.S. 413 (1973), *Bennett v. Arkansas*, 485 U.S. 395 (1988), *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989), and *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995). App. at 20-23. These cases all hold that the state's attempts to use social security benefits to pay for a beneficiary's care violated 42 U.S.C. § 407(a). While none of these decisions involved a state agency that had been appointed representative payee, the majority concluded that the "cases evince an expansive interpretation of the protections of § 407", and that "the thrust of the case law is that Social Security benefits are, for all intents and purposes, beyond the reach of the state". App. at 23.

The majority distinguished *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), *cert. denied sub nom. Crytes v. Schafer*, 502 U.S. 1095 (1992), and *C.G.A. v. Alaska*, 824 P.2d 1364 (Alaska 1992). Although both cases involved state agencies that were appointed representative payee, the majority concluded that the two decisions only hold that a state agency may be appointed representative payee and did not address the question of whether benefits may be used to pay for the beneficiaries' current care. App. at 23-25.

Based on its analysis of those decisions, the majority held that "reimbursement is barred by § 407(a) because despite [the Department's] status as representative payee it performs the role of creditor when it takes the foster child's [benefits] to reimburse itself for moneys spent on the child". App. at 25. The court also focused on the word "reimbursement", stating that "the bare logic of reimbursement also implies a creditor-debtor relationship". App. at 26. And the court pointed to Wash. Rev. Code § 74.13.060 and Wash. Admin. Code § 388-70-069, which set out the state policy that a child's assets should be used to pay for the child's care. App. at 253, 257, respectively. The court remanded the case for the calculation of attorneys fees

and the calculation of the judgment to be paid to class members. App. at 31.

b. Three Justices joined an opinion concurring in part and dissenting in part. These Justices agreed with the majority that the Department had used benefits to pay for "*past due* foster care payments", and they concluded that this practice was not permitted. App. at 32. However, they dissented from the majority's holding that § 407(a) prohibited the Department from using the benefits to pay for current care. App. at 32. The concurring/dissenting opinion rejected the majority's reliance on *Philpott*, *Bennett*, *Brinkman*, and *Crawford* because they did not involve "the expenditure of social security benefits by a state that was designated as a representative payee". App. at 36.

4. On October 31, 2001, the Department filed a timely motion for reconsideration. This motion was denied on December 14, 2001, and the mandate issued the same day. App. at 40, 41. On January 22, 2002, the Department requested a stay of the injunction from the Washington Supreme Court. The motion was denied the same day. App. at 143. On January 28, 2002, the Department filed an Application for a stay with the Honorable Sandra Day O'Connor as the Circuit Justice for the Ninth Circuit. On January 29, 2002, Justice O'Connor issued a temporary stay pending receipt of a response and further order of Justice O'Connor or the Court. App. at 142. On February 15, 2002, the Court issued an order inviting the Solicitor General to file a brief expressing the views of the United States. App. at 141. On March 1, 2002, the Solicitor General filed an amicus brief concluding that the stay should issue pending certiorari. This Court granted the stay on March 13, 2002.

REASONS FOR GRANTING THE PETITION

The Court should grant the petition for four reasons. First, the Washington Supreme Court's decision in *Keffeler* directly conflicts with the decisions of the Seventh Circuit,

the Eighth Circuit, and the Alaska Supreme Court. *Keffeler* holds that 42 U.S.C. § 407(a) prohibits a representative payee from using social security and SSI benefits to pay for a beneficiary's current care. These other courts all hold, by contrast, that § 407(a) does not prevent a payee from using benefits for current care. *Mason v. Sybinski*, 280 F.3d 788, 2002 WL 202456 (7th Cir. Feb. 11, 2002); *King v. Schafer*, 940 F.2d 1182 (8th Cir. 1991), *cert. denied sub nom. Crytes v. Schafer*, 502 U.S. 1095 (1992); *C.G.A. v. Alaska*, 824 P.2d 1364 (Alaska 1992).

Second, *Keffeler* conflicts with regulations adopted by the SSA and the Commissioner's interpretation of those regulations. SSA regulations explicitly provide that a representative payee may use the benefits to pay "for the beneficiary's current maintenance". 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 237. The Commissioner has consistently taken the position in this case that the Department's use of benefits to pay current maintenance does not violate § 407(a). The Solicitor General has reiterated that position in the amicus curiae brief filed in response to the Court's invitation.

Third, this case raises an important question of nation-wide significance. The social security and SSI programs apply throughout the United States, as do the SSA's regulations. The application of § 407(a) to a representative payee's use of benefits is a critical issue to all public agencies, such as the Department, that are appointed representative payee for beneficiaries in their care. In nearly every state, public welfare agencies use social security and SSI benefits to pay the cost of care when acting as representative payee on a beneficiary's behalf. The question in this case is also critical to parents who serve as representative payee for their children—for the logic of the *Keffeler* decision also applies to them.

Finally, *Keffeler* is wrong as a matter of law. The plain meaning of § 407(a) does not apply to a representative

payee, and reading the statutes together compels this conclusion. 42 U.S.C. §§ 405(j) and 1383(a) authorize the appointment of representative payees, who are permitted to use the benefits under the supervision of the Commissioner. Section 407(a) is directed at creditors and others who seek to obtain the benefits through "execution, levy, attachment, garnishment, or other legal process". *Keffeler's* reliance on *Philpott*, *Bennett*, *Brinkman*, and *Crawford* is misplaced because those cases did not involve representative payees. Simply put, the use of benefits by a payee—in accordance with SSA regulations—does not violate § 407(a).

A. There Is A Substantial Conflict Between *Keffeler* And Decisions Of Other Courts On The Same Issue

The Department was appointed representative payee for foster children in its care, pursuant to 42 U.S.C. §§ 405(j) and 1383(a), and has used the benefits for the beneficiary's current maintenance as authorized in 20 C.F.R. §§ 404.2040(a)(1) and 416.640(a). Despite this fact, a majority of the court in *Keffeler* held that the Department's use of the benefits constituted "other legal process" in violation of 42 U.S.C. § 407(a). According to the majority, the Department's "reimbursement is barred by § 407(a) because despite [the Department's] status as representative payee it performs the role of creditor when it takes the foster child's SSA entitlement to reimburse itself for moneys spent on the child". App. at 25. According to the court, a representative payee obligated to provide care for the beneficiary is barred from using social security benefits to pay the cost of care.

1. *Keffeler* squarely conflicts with *Mason*, *King*, and *C.G.A.* Like *Keffeler*, all three decisions involve the application of § 407(a) to a representative payee, all involve a representative payee's use of the benefits to pay for the beneficiary's current care, and all involve a state entity

responsible for paying for the beneficiary's current care—so use of the benefits for that purpose offsets a cost to the state.

a. ***Mason.*** In *Mason*, the plaintiff class sought an injunction to prevent the state hospital, "appointed by the [SSA] as representative payees, from deducting a portion of the recipients' Social Security benefits to pay for institutional maintenance without their voluntary consent". *Mason*, 2002 WL 202456 at *2. Under state law, "residents of hospitals and institutions are liable for the cost of their treatment and care. If a person is legally admitted to a state institution, however, she is entitled to care and maintenance there, regardless of her ability to pay." *Id.* at *3 (citations omitted). Thus, as in *Keffeler*, if benefits were not used to pay for care, the state would pay.

The *Mason* plaintiffs argued that use of their benefits to pay for care violated § 407(a), because "application of recipients' benefits to their cost of care without their specified consent is a form of 'other legal process'". *Mason*, 2002 WL 202456 at *3. The Seventh Circuit rejected this claim holding that a "properly appointed representative payee's responsible management of a Social Security recipient's benefits cannot amount to 'other legal process,' regardless of whether that payee is an arm of the state". *Id.* at *4. This holding is directly contrary to the holding of the Washington Supreme Court in *Keffeler*.

b. ***King.*** *King* involved plaintiffs who were "involuntarily committed to the care and custody of the Director of Mental Health". *King*, 940 F.2d at 1183. Under state law the plaintiffs and their representative payees were "jointly and severally liable for the costs of the plaintiffs' care and treatment". *King*, 940 F.2d at 1184. But, if the plaintiffs had no assets, the state would, of course, have to pay for their care, since they were involuntarily committed.

"[T]he state institutions acting as the representative payees for five of the plaintiffs apply the funds they receive on plaintiffs' behalf to monthly charges billed by the

Department for care and treatment". *Id.* The plaintiffs brought the action "to enjoin the Department's practice of using their social security benefits to pay for their care and treatment", asserting that the practice violated § 407(a). *King*, 940 F.3d at 1183.

The Eighth Circuit rejected this argument, holding that "the Department did not impermissibly use 'other legal process' to reach the plaintiffs' funds. Section 407(a) was not intended to outlaw a procedure expressly authorized by the Social Security Administration's own regulations." *Id.* at 1185. According to the court: "We cannot believe Congress contemplated this result in enacting § 407(a), particularly when this result would be contrary to another provision of the Social Security Act: § 405(j), providing for the appointment of representative payees." *Id.*[10]

c. ***C.G.A.*** In *C.G.A.*, the Alaska Department of Health and Social Services was appointed representative payee of a minor who was adjudicated a delinquent and placed at a youth center. Since the minor was placed at a youth center, the state was responsible for his care. The minor challenged the appointment of the state agency as representative payee, claiming that it violated § 407(a).

The Alaska Supreme Court ruled that there was no violation of § 407(a), holding: "[S]o long as the state agency performs its duties as representative payee and spends the funds only on authorized expenses, it would not violate the prohibition on attachment found in section 407(a)'s ban on

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[10] The majority in *Keffeler* attempts to distinguish *King*, claiming that the *King* plaintiffs only "challenged the state's procedure for applying to become representative payee". App. at 24. This claim is not accurate. As we have explained, the plaintiff's claim in *King* was that the state—as representative payee—was barred from using their social security benefits to pay for their care. This is precisely what respondents allege here.

attachment." *C.G.A.*, 824 P.2d at 1369.[11] Of course, under social security regulations, a representative payee is specifically authorized to use the benefits for current maintenance, including the "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items". 20 C.F.R. § 404.2040(a)(1), App. at 214.[12]

2. The decision below is in substantial tension with two other state court decisions, *Mellies v. Mellies*, 815 P.2d 114 (Kan. 1991), and *In re the Guardianship of Nelson*, 547 N.W.2d 105 (Minn. Ct. App. 1996). *Keffeler's* conclusion that the Department's use of the benefits violates § 407(a) is premised on the fact that the Department will

[11] *Keffeler* also attempts to distinguish *C.G.A.* by arguing that the decision "stands for no more than the uncontested proposition [that the Department] may apply to become a representative payee". App. at 25. But this is not accurate. The Alaska Supreme Court explicitly held that § 407(a) did not bar a representative payee from using the benefits for authorized expenses.

[12] *Keffeler* also conflicts with *Ecolono v. Division of Reimbursements of the Department of Health & Mental Hygiene*, 769 A.2d 296 (Md. App. 2001). In *Ecolono*, the Maryland Court of Appeals rejected the plaintiff's challenge that the state mental hospital that had been appointed his representative payee violated § 407(a) when it used his social security benefits to pay for his current care. The court held that "the voluntary application of benefits by a representative payee to the cost of current maintenance is not a violation of § 407(a)". *Ecolono*, 769 A.2d at 312. Based on federal statutes and social security regulations, the court concluded that "the application of social security benefits to current maintenance is regarded by the SSA as being in the best interest of the beneficiary". *Id.* at 305.

We have found only one reported decision involving a representative payee that is consistent with *Keffeler*. *Muller v. New York*, 179 Misc. 2d 980, 686 N.Y.S.2d 652 (N.Y. Ct. Cl. 1999), *aff'd*, 280 A.D.2d 923, 719 N.Y.S.2d 916 (N.Y. App. Div. 2001). *Muller* mainly "focuses on . . . compliance with State law". *Muller*, 686 N.Y.S.2d at 655. But the court also stated that there was a violation of § 407(a). *Id.* at 657. Though *Muller* is consistent with *Keffeler*, it too conflicts with the other decisions we have discussed.

provide foster care even if it does not receive social security benefits. But this is also true of parents who serve as representative payee for their children. Parents have a legal obligation to support their children, even if there are no social security or SSI benefits. *See, e.g.*, Wash. Rev. Code §§ 26.20.030-.035. Thus, to paraphrase *Keffeler*: "[I]f [a parent] is appointed representative payee for a . . . child [the parent] will confiscate the child's SSI money to benefit the [parent]. However, if anyone else is appointed, the [parent] will bear the cost of . . . care". App. at 18. Therefore, under *Keffeler's* reasoning, a representative payee parent may not use the benefits to pay for current maintenance. But both the Kansas Supreme Court and the Minnesota Court of Appeals have rejected this position.

In *Mellies*, a father was appointed representative payee for his son. The father was able to support the son without using the social security benefits. The son brought an action claiming that the benefits could not be used for current maintenance. Since the father was able to support him, the son argued that the father had a fiduciary duty to hold the benefits and invest them. This is the same rationale adopted in *Keffeler*. The Kansas Supreme Court rejected the son's claim because it was inconsistent with 20 C.F.R. § 404.2040, App. at 214, which authorizes a representative payee to use the benefit to pay for current maintenance. According to the court: "The Social Security Administration's interpretation of its own regulations is entitled to great weight and, probably, controlling weight." *Mellies*, 815 P.2d at 117.

Nelson reached the same conclusion. *Nelson* also involved a father who had been appointed his son's representative payee. State law required parents to personally provide for the support of their children, and the trial court held that the father could only use social security benefits for special needs—not current maintenance. The Minnesota Court of Appeals rejected this conclusion. According to the court, the

son's claim that benefits could not be used for current maintenance "directly conflicts with federal law". *Nelson*, 547 N.W.2d at 108. The court went on to say that if the benefits were not used for current maintenance it would also prevent "accomplishment of Congress's goal in establishing social security disability and survivor benefits: to replace income that would otherwise be available from a disabled or deceased parent for the beneficiary's current maintenance". *Id.*

Mellies and *Nelson* both recognize that 20 C.F.R. § 404.2040 authorizes a representative payee to use benefits to pay for the current cost of care—even if the payee is obligated and able to provide the care. *Mellies* and *Nelson* cannot be reconciled with the court's reasoning in *Keffeler*, which prohibits using benefits to pay for current care.

B. *Keffeler* Conflicts With Regulations Adopted By The Social Security Administration

Keffeler also conflicts with regulations adopted by the SSA and the Commissioner's interpretation of those regulations. When Congress enacted Title II and Title XVI, it granted the Commissioner "full power and authority to make rules and regulations". 42 U.S.C. §§ 405(a), App. at 156; 1383(d)(1), App. at 200. Title II and Title XVI require that a representative payee make proper use of the benefits. A representative payee may be appointed when the Commissioner "determines that the interest of any individual . . . would be served thereby". 42 U.S.C. §§ 405(j)(1)(A), App. at 157; 1383(a)(2)(A)(ii), App. at 178. The Commissioner is required to revoke certification of payment if the "representative payee has misused any individual's benefit". 42 U.S.C. §§ 405(j)(1)(A), App. at 157; 1383(a)(2)(A)(iii), App. at 179. In addition, Congress required the Commissioner to establish a system of accountability monitoring to make sure that the benefits are properly used. 42 U.S.C. §§ 405(j)(3)(A), (B), App. at 165; 1383(a)(2)(C)(i), (ii), App. at 185-86.

Under the applicable regulations, the benefits are deemed to be used "for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance", which includes "cost incurred in obtaining food, shelter, clothing, medical care, and personal comfort items". 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 237. It is undisputed that the Department uses the benefits it receives as representative payee to pay for the cost of current care.

Thus, *Keffeler* forbids what the Commissioner's regulations explicitly permit—using benefits to pay for the beneficiary's current care. Moreover, the Commissioner has specifically stated in this case that the Department's use of benefits to pay for current care is proper under the regulations. See Brief For The United States As Amicus Curiae at pages 16-17, which was filed in response to an invitation from the Court. App. at 141.

C. This Case Presents An Important National Question

The petition should be granted because this case presents an important national question. The Department has attempted to contact every other state. To the best of our knowledge, in every state, public social service agencies at the state or local level are appointed representative payee for various beneficiaries and use the benefits to pay for current maintenance. The decision below thus calls into question the way in which public agencies in *every* state fulfill their important function as representative payee of last resort for social security beneficiaries. In addition, because of the substantial amount of federal benefits at issue, the decision below diminishes the incentive of states or local governments to act as representative payee for foster children and other beneficiaries within their custody.

Moreover, the importance of the question is not limited to state and local social service agencies. Many

beneficiaries must have representative payees appointed to receive their benefits. The question is how may those benefits be used. This is a fundamental question that goes to the heart of the social security and SSI programs, and it affects every representative payee appointed by the Commissioner. For instance, parents, such as the fathers in *Mellies* and *Nelson*, are appointed representative payee and use the benefits to pay for current maintenance. The decision below would appear to prohibit this practice.

D. *Keffeler* Is Wrong As A Matter Of Law

1. The Court should also grant the petition because *Keffeler* is wrong as a matter of law. To begin with, the plain language of 42 U.S.C. § 407(a) does not apply to the Department's use of the benefits to pay for current care. Section 407(a) provides that the right to future payment of benefits "shall not be transferable or assignable", and that none of the benefits "shall be subject to execution, levy, attachment, garnishment, or other legal process". The Department's use of benefits to pay for a foster child's care is neither an assignment of future payments, nor an execution, levy, attachment, garnishment, or other legal process against current payments within the ordinary meaning of those terms.

Moreover, § 407(a) must be read with 42 U.S.C. §§ 405(j), App. at 157, and 1383(a)(2)(A)(ii)(I), App. at 178, which authorize the Commissioner to appoint representative payees. Instead of violating § 407(a), the Department's use of the benefits actually implements a carefully crafted federal statutory plan to appoint responsible representative payees for needy children and ensure that benefits are properly used. The Commissioner investigates, appoints, and monitors representative payees to ensure that benefits are properly used. The Commissioner's regulations provide that a payee may use benefits for the beneficiary's current care. 20 C.F.R. §§ 404.2035, App. at 213; 416.635(a), App. at 236. If the Commissioner finds that a representative payee has misused

benefits, the law requires the Commissioner to "promptly revoke certification for payment of benefits to such representative payee . . . and to certify payment to an alternative representative payee". 42 U.S.C. §§ 405(j)(1)(A), App. at 157; 1383(a)(2)(A)(iii), App. at 179.

It is illogical to conclude that § 407(a) prohibits what §§ 405(j) and 1383(a)(2)(A)(ii)(I) permit, especially when the provisions are easily harmonized. Section 407(a) protects benefits from execution, levy, attachment, garnishment, or other legal process by a person who is not a representative payee. When a representative payee is appointed, it is the Commissioner's job to ensure that the payee uses the benefits properly. Indeed, creditors are generally prohibited from being appointed representative payee, unless the creditor falls within a specific exception to the prohibition. 42 U.S.C. §§ 405(j)(2)(C)(i)(III), (iii), App. at 160; 1383(a)(2)(B)(iii)(III), (v), App. at 181.

2. *Keffeler* is also flawed because the majority substituted its judgment for that of the Commissioner. This Court has "long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer". *Chevron U.S.A., Inc. v. Natural Res. Def. Coun., Inc.*, 467 U.S. 837, 844 (1984). Congress expressly authorized the Commissioner to adopt regulations to implement Title II and Title XVI. 42 U.S.C. §§ 405(a), App. at 156; 1383(d)(1), App. at 200. A representative payee must use the benefits properly, but Congress left it to the Commissioner to define exactly how the benefits were to be used. The majority in *Keffeler* did not even acknowledge the Commissioner's interpretation, let alone give it the deference that this Court has said it deserves.

The majority substituted its judgment for that of the Commissioner in two respects. First, it held that the Department, as representative payee, could not use the benefits to pay for a beneficiary's current care. The

Commissioner's regulations expressly provide that such payments are permitted. 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 237. Second, the majority concluded that using benefits to pay for current care was not in the best interest of the beneficiary. ("We seriously doubt using the SSA benefits to reimburse the state for its public assistance expenditure is . . . in the best interest of the beneficiary." App. at 28.) This conclusion is directly contrary to the conclusion reached by the Commissioner. The regulations provide that benefits have been used "for the use and benefit of the beneficiary if they are used for the beneficiary's current maintenance". 20 C.F.R. §§ 404.2040(a)(1), App. at 214; 416.640(a), App. at 237.

3. The cases relied on by the Washington Supreme Court do not support a departure from the plain meaning of § 407(a) and the Commissioner's regulations. None of these decisions involve a representative payee—in each case, instead, the benefits were paid to the beneficiary directly. In *Philpott*, for instance, the recipient of social security benefits entered into an agreement to reimburse the county welfare board for payments received. *Philpott*, 409 U.S. at 414. When the recipient wouldn't pay, the county "sued to reach the bank account under the agreement to reimburse". *Id.* at 415. The county's suit fell within the express prohibition of § 407(a), which prohibits "execution, levy, attachment, garnishment, or other legal process".

Bennett involved individuals incarcerated in Arkansas prisons who received social security benefits. No representative payee was appointed for the prisoners. A state law "authorize[d] the State to seize a prisoner's property or 'estate' in order to help defray the cost of maintaining its prison system". *Bennett*, 485 U.S. at 396. Once again, the seizure of benefits fell directly within the prohibition of § 407(a), and the Court refused to read into § 407 "an 'implied exception' that would allow attachment of otherwise exempted federal payments simply because the State has

provided the recipient with 'care and maintenance'". *Id.* at 397.[13]

4. The majority also attempts to support its decision by characterizing the Department as a creditor. The majority focuses on the word "reimbursement". ("Furthermore, the bare logic of reimbursement also implies a creditor-debtor relationship." App. at 26.) The majority's reasoning on this point is flawed. The Department is not a creditor. The Department only reimburses itself in an accounting sense in that it pays for care first and then uses the social security and SSI benefits. App. at 61, ¶ 54. For example, in February the Children's Administration pays providers for the child's January foster care expenses. In March, after the accounting is performed, the Trust Fund Unit applies the January benefit for the care provided in January. However, the result would be exactly the same if the Department sent the January benefit to the foster parent in January, along with a second public assistance check to make up the difference. In this situation, the child receives the benefits and the Department would pay out fewer public assistance dollars—but there would be no reimbursement.[14]

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[13] *Keffeler* also relied upon *Brinkman v. Rahm*, 878 F.2d 263 (9th Cir. 1989), and *Crawford v. Gould*, 56 F.3d 1162 (9th Cir. 1995). Neither of these cases involved a representative payee. In *Brinkman*, the class was defined as "those patients who receive Social Security Old Age Survivor's and Disability Insurance (OASDI) benefits, and for whom the state is not the representative payee". *Brinkman*, 878 F.2d at 264 (emphasis added). In *Crawford*, the class included patients "who receive Social Security benefits which are deposited in the patient's personal deposit fund, for whom the State is not the representative payee, and for whom these funds have been or are subject to being applied as payments towards the costs of the patient's care and treatment at the hospital". *Crawford*, 56 F.3d at 1163 n.1.

[14] The majority cites Wash. Rev. Code § 74.13.060 to support its notion that reimbursement establishes a creditor-debtor relationship. App. at 26. In fact, the statute provides reimbursing public assistance "expended on behalf of said *person during the period for which the*

This is consistent with the Commissioner's regulations which provide that a " payee may not be required to use benefit payments to satisfy a debt of the beneficiary, *if the debt arose prior to the first month for which payments are certified to a payee*". 20 C.F.R. §§ 404.2040(d), App. at 216; 416.640(d), App. at 239 (emphasis added). Thus, if benefits are certified in January, a payee cannot be required to pay a debt that arose in December. This rule does not prohibit using January benefits to pay for the cost of care in January. Indeed, even if the debt arose prior to the first month for which payments were certified, a payee may satisfy the debt "if the current and reasonably foreseeable needs of the beneficiary are met". 20 C.F.R. §§ 404.2040(d), App. at 216; 416.640(d), App. at 239.

CONCLUSION

For the foregoing reasons the Petition For A Writ Of Certiorari should be granted.

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benefits, payments, funds or *accruals were paid*". Wash. Rev. Code § 74.13.060(2), App. at 26, 253 (emphasis added). Thus, January benefits go to pay the January cost of care. As described above, that is exactly how the Department operates.